For Opinion See 90 S.Ct. 661

U.S., 2004.

Supreme Court of the United States.
Timothy J. BREEN, Petitioner,
v.
SELECTIVE SERVICE LOCAL BOARD NO. 16, Bridgeport, Connecticut, and Brig. Gen. Ernest E. Novey, Individually and as Director of Selective Service for Connecticut, Respondents.
No. 65.
October Term, 1969.
July 28, 1969.

On Certiorari to the United States Court of Appeals for the Second Circuit

Brief for Petitioner

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Cases

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***1** Opinions Below.

The decision of the district court is reported at 284 F. Supp. 749 (D. Conn. 1968). The decision and opinion of the

court of appeals is reported at 406 F. 2d 636 (2d Cir. 1969), and is reprinted in the Appendix at 8-22.

Jurisdiction.

The judgment of the court of appeals was entered on January 10, 1969. The petition for certiorari was filed March 10, 1969. This court has jurisdiction under 28 U.S.C. § 1254(1).

***2** Statutes and Regulations Involved.

U.S. Const., amend. 1

U.S. Const., amend. 5

U.S. Const., amend. 6

Military Selective Service Act of 1967, §§ 5(a)(1), 6(h)(1), 10(b)(3), 12(a), 12(b)(6) 32 C.F.R. §§ 1602.4, 1622.25, 1642.1--.46

Questions Presented.

1. Whether § 10(b) (3) of the Military Selective Service Act of 1967 precludes preinduction judicial review of the action of a local draft board in stripping a full-time undergraduate student of his statutory deferment provided under § 6(h)(1) of the Act, declaring him delinquent and ordering him to report for induction on the ground that as a personal conscientious protest against the war in Vietnam he turned in his selective service registration certificate.

2. Whether § 10(b) (3), as interpreted in *Oestereich v. Selective Service Bd.,* 393 U.S. 233 (1968), and *Clark v. Gabriel,* 393 U.S. 256 (1968), permits preinduction judicial review of violation by a board of any clear legal duty.

3. Whether the declaration of delinquency, punitive reclassification and order to report for induction of petitioner violate the first amendment, the due process clause of the fifth amendment, the sixth amendment, the Military Selective Service Act of 1967, and the selective service regulations.

***3** Statement of the Case.

The following statement of facts is taken from the allegations of the complaint, taken as admitted for purposes of this proceeding by the government's motion to dismiss the complaint. *Clark v. Uebersee Finanz-Korporation,* 332 U.S. 480 (1947), and from the Agreed Statement of Facts on Appeal (Appendix, pp. 1-3).[FN*]

FN* In this brief, references to “Appendix,” without more, refer to the separate appendix filed under this Court's Rule 36. “Appendix A” refers to the appended statutes and regulations, bound with this brief.

At all times relevant to this case, petitioner was a duly-enrolled full-time undergraduate student at the Berkeley School of Music, Boston, Massachusetts. He met the requirements for a II-S deferment under § *6* (h)(1) of the Military Selective Service Act of 1967, 50 U.S.C. App. § 456(h)(1). He had been classified II-S by his draft board, Local Board No. 16, Bridgeport, Connecticut for the 1967-68 academic year.

On November 16, 1967, together with a number of other selective service registrants, petitioner delivered his registration certificate (SSS Form 2) to a clergyman, solely for the purpose of registering his dissent from participation by the United States in the war in Vietnam. Thereafter, he received a delinquency notice (SSS Form 304) mailed on January 9, 1968, informing him that he had been "declared delinquent" because of "Failure to have Registration Certificate in your possession." Simultaneously, on January 9, 1968, petitioner was reclassified from II-S to I-A by his local board.

As noted in the majority opinion below, these actions by Local Board No. 16 "were in line with a memorandum***4** and letter dated respectively October 24 and October 26, *1967,* from the Director of Selective Service." (The letter and memorandum are reprinted as Appendix B to the Brief for Petitioner, *Gutknecht v. United States,* No. 71, O.T. 1969.) This memorandum and letter addressed to all local selective service boards advised the boards, among other things, to deny deferments to any registrant who takes part in "any action that violates the Military Selective Service Act." The declaration that petitioner was a delinquent and his reclassification to I-A were in compliance with General Hershey's instructions. The letter directed local boards to act on the basis of information received concerning so-called "illegal" demonstrations involving registrants such as the petitioner, on the strength of which classifications were to be reopened, the registrant classified anew,

"and if evidence of violation of the Act and Regulations is established, also to declare the registrant to be a delinquent and to process him accordingly."

On January 11, 1968, Local Board No. 16 mailed petitioner an order to report on January 29, 1968, for a physical examination (SSS Form 223). This examination was subsequently postponed.

In February 1968, petitioner appealed his reclassification to the selective service appeals board under the provisions of 32 C.F.R. § 1626.2.[FN1]

> FN1. The operation of the delinquency regulations. including the right of certain reclassified registrants to appeal from the decision of the local board, is set forth in Brief for Petitioner, *Gutknecht v. United States,* No. 71, O.T. 1969, Point I, A.

On February 20, 1968, petitioner filed suit in the United States District Court, District of Connecticut, seeking a judgment that the declaration of his delinquency***5** and his reclassification were null and void, an injunction against his induction into the armed forces, and $20,000 damages. Petitioner sought further to have the delinquency regulations, 32 C.F.R. §§ 1642.1.46 declared unconstitutional on their face and as applied to him and to declare unconstitutional the letter and memorandum of General Lewis B. Hershey.

Respondents moved to dismiss the complaint on March 8, 1968, on the grounds of lack of jurisdiction, relying upon § 10(b)(3) of the Military Selective Service Act of 1967. Respondents also moved for dissolution of the temporary restraining order which had been issued by the Court on March 1, 1968. After hearing on March 8, 1968, the district court granted respondents' motion to dismiss, holding that the Court was deprived of jurisdiction by § 10(b) (3).

Subsequent to the decision of the district court, petitioner's administrative appeal was unanimously decided against him and he was ordered to report for induction. In April of 1968, pursuant to an order of his local board, petitioner submitted to a preinduction physical examination and was determined to be physically fit for military duty. His order to report for induction was stayed by the district court pending decision by the court of appeals. A further stay was granted by the court of appeals at the time of oral argument, which stay was extended by that court following its decision affirming the district court (one judge dissenting), on January 10, 1969.

Summary of Argument.

Petitioner argues, first, that this case is controlled by *Oestereich v. Selective Service Bd.,* 393 U.S. 233 (1968). The reclassification and order for priority induction***6** in this case came in the identical fashion and for the same reasons as that at issue in *Oestereich.* The possible distinction between petitioner's statutory "deferment" and Oestereich's statutory "exemption" is shown to be without basis in the holding of the Court in *Oestereich* and in the structure of the Military Selective Service Act of 1967.

Taking a somewhat broader view of this case, petitioner also contends that preinduction review should be available in any case in which a clear legal duty owed the registrant by the board is at stake. Permitting review in such cases is shown to prejudice no interest of the System, and to protect interests given consistent recognition in selective service decisional law.

Recognizing that *Clark v. Gabriel,* 393 U.S. 256 (1968), may be said to bar consideration of the issue, petitioner discusses the serious constitutional questions tendered by § 10(b)(3)'s restrictions on the scope and timing of judicial review in draft cases. Petitioner contends that even if not controlling, the constitutional questions raised require that § 10b) (3) be given a narrow reading.

Turning to the validity of his reclassification, petitioner adopts and incorporates by reference the quite lengthy argument on this point in the petitioner's brief in *Gutknecht v. United States,* No. 71, O.T. 1969. He also argues that the statutory delinquency concept is not broad enough to sustain revocation of an immunity from induction unequivocally granted, and that the failure of the local board to give him proper notice prior to terminating his deferment and attempting to pull him out of school in the middle of the year violated the selective service regulations and due process of law.

***7** ARGUMENT.

I.

SECTION 10(b)(3) OF THE MILITARY SELECTIVE SERVICE ACT OF 1967 DOES NOT BAR JUDICIAL REVIEW OF THE DELINQUENCY DECLARATION AND RECLASSIFICATION OF PETITIONER.

A. Oestereich v. Selective Service Board, 393 U.S. 233 (1968) Is Controlling and Requires Preinduction Relief by Way of Mandamus or Injunction.

The argument under I, A is in three parts. First, it is contended that a II-S undergraduate student deferment is analytically indistinguishable from the divinity student exemption considered in *Oestereich.* Second, it is urged that a distinction, for judicial review purposes, between deferments and exemptions would be irrational. Third, *Oestereich* is reanalyzed and a principle is suggested which accommodates the need for early judicial review in some cases with the asserted "manpower" needs of the Selective Service System.

1. Oestereich Requires Review Because a Statutory Right Is at Stake.

This Court's recent decision in *Oestereich v. Selective Service Board,* 393 U.S. 233 (1968) controls this case. In *Oestereich,* as here, petitioner was a student classified as provided by statute in a classification category "lower" than I-A. See 32 C.F.R. § 1623.2 (1969) (setting forth the priority of classification categories and requiring that a registrant be placed in the "lowest class for which he is determined eligible"). As long as ***8** his classification continued, Oestereich, like Breen, was effectively immune from induction into the armed forces.[FN2] Sec. 5(a)(1) of the Military Selective Service Act of 1967 authorizes the President to induct only those who are not "deferred or exempted." *Cf.* 32 C.F.R. § 1631.7, which provides for the induction of only those who are classified I-A and I-A-O. Like Breen, Oestereich abandoned his registration certificate as a form of personal, conscientious protest to the controversial war effort being waged by the government of the United States in Southeast Asia. Similarly, Breen, like Oestereich, was reclassified as a delinquent I-A by his local board without a hearing or judicial determination of the legal propriety of his acts; without the opportunity to "cure" the alleged violation of duty which was admittedly the grounds for the reclassification; without further consideration by the local board of the validity of the former classifications which it had granted; and pursuant to a November 8, 1967, letter from the Director of the Selective Service System, Lt. Gen. Lewis B. Hershey, to all local draft boards.[FN3] In each case, after exhausting all administrative remedies, efforts by the registrant to enjoin his local board from inducting him were unsuccessful in the district court and the court of appeals, and each petitioned this Court for certiorari. In *Oestereich v. Selective Service Board,* 393 U.S. 233 (1968), this Court held that injunctive ***9** review would be allowed when a board acted in a clearly lawless manner and when the reclassification was based upon "activities or conduct not material to the grant or withdrawal of the exemption." 393 U.S. at *237.* The Court noted as well that "the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards." *Id.* at 238-239. In allowing "early judicial review"[FN4] the Court held that the literal language of the Military Selective Service Act of *1967* must be read harmoniously with the "Act taken as an organic whole." 393 U.S. at 238. Because § 6(g) of the Act specifically provided for an "immune" classification in *Ostereich's* case (see also 32 C.F.R. § 1622.43 (1969)) the Court held that a registrant should not be enforced to select one of two perilous--and, in the case of refusal of induction, ignominious--procedures in order to gain judicial review to vindicate his statutory right[FN5] (if at all, for it is difficult to calculate how many men whose local boards have erred are hardy enough to press their claims in a criminal prosecution for induction refusal or a habeas corpus proceeding).[FN6] Thus, where the regis-

trant's classification***10** immunizing him from induction was created by the statute, where the reclassification was not upon the basis of activities or conduct material to the original grant of classification, and where the reclassification was not pursuant to the statutory commands of the Act, § 10(b)(3) would not preclude early judicial review.

FN2. Of course, "[n]o classification is permanent," 32 C.F.R. § 1625.1(a), but this is true only because "[n]o exemption or deferment ... shall continue after the cause therefor ceases to exist." 50 U.S.C. App. § 456(k). Breen was. at all times relevant to this case, a full-time student in good standing at the Berkeley School.

FN3. Reproduced in *Appendir B to Brief for Petifioner. Gutknecht v. United States,* No. 71, O.T. 1969, and in the Petition for Certiorari in this case, pp. 59-62.

FN4. Mr. Justice Clark, in *Dickinson v. United States,* 346 U.S. 389 (1953) and *Witmer v. United States,* 348 U.S. 375 (1956), used the term "direct judicial review" to refer to the same thing. See I, A, 3, *infra.*

FN5. "To hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness.... Our construction leaves § 10(b)(3) unimpaired in the *normal* operations of the Act." 393 U.S. at 238 (emphasis added).

FN6. See, *e.g., Ex parte Pabiani,* 105 F. Supp. 139 (E.D. Pa. 1952) granting early judicial review because the Hobson's choice facing the registrant might chill his efforts to vindicate his rights in a court of law and because the board action was so patently outrageous; *Petersen v. Clark,* 285 F. Supp. *700* (N.D. Cal. 1968) holding § 10(b)(3) unconstitutional for having a chilling effect upon the assertion of the registrant's constitutional right to judicial review. Not only is the thought of defending a criminal prosecution unpalatable to most registrants, but so is the thought of contesting the classification once the registrant has submitted to the allegedly invalid order on *habeas.* Beyond the problem of being spotted as a trouble maker during the period of time when the petition is being considered by a court of law are the grave pragmetic problems of being able to present a meaningful case, often far from one's home. Mr. Jusice Murphy summarizes some of these problems in his concurrence in *Estep v. United States, 327* U.S. 114 (1946) and concludes that "no more difficult condition precedent to judicial review" is known. The Solicitor General made this point well in his brief in *Oestereich,* pp. 60-61:
"it is *possible* to have review only through criminal prosecution, or through habeas corpus, and to have the ministerial exemption recognized at that point. But there are difficulties. After a draft board issued a notice of induction, a registrant is surely in peril if he refuses to comply with it, and he may find himself effectively in service, if he does comply with it. It might be claimed that he had waived his exemption by responding affirmatively to induction [see *Gibson v. United States,* 329 U.S. 338 (1946)], and he may be held not to have exhausted his administrative remedies if he refuses to accept induction. See *Falbo v. United States,* 320 U.S. 549, 553. Moreover, he does not have an opportunity to find out in advance whether he is wrong, and to decide then whether to take the penalty or to accept the legal conclusion as to his status. He must take the risk in order to find out whether he is subject to a penalty."

The *Oestereich* test, therefore, as further explained in the *per curiamn* disposition of ***11***Clark v. Gabriel,* 393 U.S. 256 (1968), will allow review of a registrant's punitive reclassification where he previously held a statutorily granted non-inductible classification. Sec. 10(b) (3), as this Court held in *Gabriel,* is designed to limit judicial review to the criminal prosecution when the challenged board action is susceptible of a "basis in fact" review; that is, where the board acts within its "discretion."[FN7] The Military Selective Service Act of 1967, however, deprived local boards of all discretion in dispensing II-S deferments to undergraduates. The deferment which is granted to undergraduate students under the Military Selective Service Act of 1967 is now mandatory. Section 6(h)(1) provides in pertinent part:

> FN7. See concurring opinion of Harlan, J., in *Oestereich,* 393 U.S. at 239; concurring opinion of Douglas, *J.,* in *Gabriel,* 393 U.S. at 259. It should be noted that prior to 1967, "[l]ocal board autonomy in devising deferment and exemption standards [resulted] in 4,000 different *conscription* policies," Comment, 54 Calif. L. Rev. 2123, 2162 (1966). Of course in several other areas, notably those of I-O (conscientious objectors) and II-A (occupational) classifications, local boards retain much of their unfettered and uncontrolled discretion in deciding what standards are to be applied and who is to receive deferment. See the National Advisory Comm'n on Selective Service, in Pursuit of Equity, Who Shall Serve When Not All Serve? (1967) [The Marshall Comm'n Report]; Hearings on the Extension of the Universal Military Training & Service Act Before the House Comm. on Armed Services, 90th Cong., 1st Sess. (1967) (testimony of Burke Marshall); Local Board Memorandum No. 95, issued April 19, 1968, reprinted in Sel. Serv. L. Rep. at 2200:3.

"Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a fulltime course of instruction at a college, university, ***12** or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action...."

In the same manner, § 6(g) of the Act provides that ministry students shall not be required to train or serve for so long as they are satisfactory pursuing courses of instruction in recognized divinity schools (and upon graduation continue to be immune from service as ministers under the same section of the Act):
"[S]tudents preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing fulltime courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have preenrolled, shall be exempt from training and service (but not from registration) under this title."

Thus Congress has declared as a *national* policy that petitioner, under § 6(h)(1) of the Act, like Oestereich under § 6(g) of the Act, shall be immune from service ***13** and training for as long as he meets the elementary statutory criteria.[FN8]

FN8. The System makes it easy to get and keep the II-S by use of a simple form (SSS Form 109) which the registrant's school fills out and sends to the board. This form is reprinted at Sel. Serv. L. Rep. 2156:7.

Indeed, § 6(h) (1) may be construed to be even stronger than the pertinent statutory provision in Oestereich, for it declares that undergraduate student deferments are not to be "substantially restricted or terminated" unless the President specifically finds that "the needs of the Armed Forces require such action." As Judge Feinberg correctly emphasized, citing authorities in his dissenting opinion below, reprinted in the Appendix, p. 18:
"This is about as clear a statement of congressional intent as you can get, made all the more emphatic by its appearance in the Selective Service Act for the first time in the 1967 amendments."

It should also be noted that the 1967 Act changed the provisions of § 6(h)(1) so as to make student deferments mandatory, using the term "shall" in place of the prior discretionary language authorizing the President to provide for such deferement when "found to be necessary to the maintenance of the national health, safety, or interest...." The importance of this change cannot be gainsaid. Unlike some of the 1967 amendments to the conscription law which bore signs of haste and Congressional pique,[FN9] the basic student deferment policy of § 6(h) (1)--though unhappily the section is not a model of draftsmanship--is ***14** the product of an informed and deliberate Congressional choice. The Marshall Commission had recommended, by a closely divided vote and over a strong dissenting opinion, that student deferments be done away with. The panel headed by Mark Clark and named by Chairman L. Mendel Rivers (D-S.C.) of the House Armed Services Committee had strongly recommended that undergraduate student deferments be made the subject of mandatory legislation. The House Armed Services Committee concurred with the Marshall Commission dissenters and the Clark panel. See H.R. Rep. No. 267, 90th Cong., 1st Sess., at 10 (1967).

FN9. See, *e.g.-§* 10(b)(3) of the Act, which the government conceded and the Court held in *Oestereich* cannot "sustain a literal reading." 393 U.S. at 238.

Prior to the 1967 amendments, the regulations left the deferment of individual students to the discretion of the local boards, 32 C.F.R. § 1622.25(a) (1965), and the promulgation of criteria to the Director of the Selective Service. 32 C.F.R. § 1622.25(b) (1965). There was no clearly expressed national policy on student deferments, either by statute or regulation.

The majority opinion in the court of appeals ignores the statutory language and the clear statutory commands of § 6(h)(1) by placing heavy emphasis on the phrase "under such rules and regulations as [the President] may prescribe." This ignores the introductory phrase of § 6(h)(1) which governs it, namely, "Except as otherwise provided in this paragraph ..." This controlling language requires that a student deferment *"shall* continue" until and unless one of several specified events takes place, none of which have anything to do with an alleged delinquency for failure to possess one's draft card. The section, taken as a whole, does not visit any discretion upon the President to restrict the statutory grant of deferments, but ***15** authorizes the making of procedural and definitional rules only. The power has been so construed by the President in making the implementing regulations, 32 C.F.R. § 1622.25 (1969). This reading of the prefatory language to § 6(h)(1) is supported by the occurrence, later in the subsection, of the following provision:
"Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only on a finding that the needs of the Armed Forces require such action."

This language permits the President to restrict deferments, but only on a *finding* of the proper kind, and only by making regulations of general and uniform application. It demonstrates a Congressional intention to take away from *local boards* the power to interfere with student deferments under any circumstances. Sec. 6(h) (1) is, therefore, in harmony with § 6(k) which follows almost immediately after it and provides:
"No exception from registration, or exemption *or deferment* from training and service, under this title, shall continue after the cause therefor ceases to. exist."

The word "delinquents" in § 6(h)(1) is so obviously irrelevant to all provisions of that statute that it hardly merits attention.[FN10] But the majority opinion below distinguishes *Oestereich* by laying heavy emphasis upon the fleeting reference to that word in a definition of the phrase, "prime age group." However, just as in *Oestereich,* this statutory deferment is "plain and unequivocal ... and since the scope of the statutory delinquency***16** concept is not broad enough to sustain a revocation of what Congress has granted *as a statutory right* ... judicial review is not precluded in cases of this type." 393 U.S. at 238-239.

FN10. See Point II, *infra.*

The Court should, petitioner submits, also take notice of the context within which the reclassification in this case occurred. The Hershey letter and directive, as is argued at length in Brief for Petitioner, *Gutknecht v. United States,* No. 71, O.T. 1969, clearly trespass upon the first amendment. Petitioner's reclassification rested in part, as the courts below noted, upon the letter and directive. This unauthorized and primitive use of the delinquency power, at least equally with the character of the deferment of which petitioner was deprived, warrants preinduction review. See *Nat'l Students Ass'n v. Hershey,* ____ F. 2d ____ (D.C. Cir. 1969).

2. There Is No Meaningful Distinction Between "Exemptions" and "Deferments."

Nor, petitioner contends, may the government find refuge from the force of this argument by retreating to a purported distinction between "exemptions" and "deferments." In analyzing the delinquency concept as it was defined in *Oestereich,* such a distinction is fanciful, for it is not grounded in either the statutes or regulations in any way which gives it utility as an analytical tool. The dissenters in *Oestereich* point out that lifting the bar to early judicial review in cases involving statutory exemptions will require the Court, under analytically indistinguishable considerations of policy and construction, to lift it in cases involving statutory deferments which "just as 'plainly' preclude a registrant's induction." 393 U.S. at 249 n. 9. Since "no classification is permanent" 32 C.F.R. § 1625.1(a) and ***17** all deferments and exemptions bar induction, Military Selective Service Act of 1967, § 5(a)(1), it is obvious that permanency is no distinction between exemptions and deferments and that whatever distinction between them there might have been before Congress made student deferments a statutory right under national policy no longer exists. Student deferments within the criteria of § 6(h)(1) are expressly provided for by statute, their grant requires no discretion on the part of the board, and punitive reclassification of a registrant who formerly held a II-S and remains clearly entitled to deferment should be the subject of early judicial review.

The "exemption-deferment" distinction is useful, petitioner contends, for one purpose and one purpose only: distinguishing between those classifications the granting of which extends a registrant's liability for service from age 26 to

age 35, and those which do not involve an extension of liability. The extension of liability provision was added to § 6(h)(2) of the Act in 1951, 50 U.S.C. App. § 456 (h)(2). 65 Stat. 83. Indeed, since the Act does not define all immunities from induction as deferments or exemptions, there exists some question whether particular immunities fall under one heading or another. The Selective Service Director's list of "deferments" and "exemptions" appears highly arbitrary at points. Local Board Memorandum No. 38; *cf.* Griffiths, *Some Notes on the SG's Memorandum in Oestereich,* 1 Sel. Serv. L. Rep. 4012, 4014 (1968). And even the hypothetical difference between exemptions and deferments disappears when one realizes that a registrant whose liability is extended, but who is over 26, is placed in such a low priority for induction that he will not be ***18** reached except in time of total national mobilization. 32 C.F.R. § 1631.7(a) (1969).

Meaningful analysis requires, therefore, the recognition of at least four kinds of classification categories: there are statutory exemptions from training and service[FN11] which can be identified as such,[FN12] deferments mandatorily and unequivocally granted by statute,[FN13] deferments for which the President may (or may not, in his discretion) provide by regulation or which are provided and require the local board to exercise its judgment concerning questions of grant or denial,[FN14] and, finally, classifications which do not determine whether ***19** a registrant shall serve, but rather what type of service he will perform (combatant, noncombatant, civilian alternative service).[FN15] (In addition, there are the order of call categories which are at issue in *Gutknecht,* No. 71, O.T. 1969.)

FN11. There are also exemptions from registration, but since these operate to exclude their beneficiaries entirely from the jurisdiction of the Selective Service System, they are not relevant here. If the System wanted to challenge a nonregistrant about the interpretation of one of these, a civil declaratory judgment action or a criminal prosecution would have to be instituted. The exemptions from registration are catalogued and analyzed at Sel. Serv. L. Rep. Practice Manual ¶ 1007.

FN12. Those exempt include veterans, § 6(b) of the Act and 32 C.F.R. § 1622.40(a) (1)-(9); sole surviving sons, § 6(o) and 32 C.F.R. § 1622.40(a) (10); ministers and ministry students, § 6(g) and 32 C.F.R. § 1622.43, although the Solicitor General has argued that others not specifically exempted by the terms of the Act should be so considered, for precisely the reasons that mandatory or statutory defennents should be accorded the juridical rights of exemptions. See Brief for Respondents, *Oestereich v. Selective Service Bd.,* 393 U.S. 233 (1968) at 65.

FN13. Those given statutory deferments include, other than fulltime undergraduate students (§ 6(h) (1) of the Act and 32 C.F.R. § 1622.25): the Vice President of the United States, the Governors of the several states and territories, and possessions, and all other officials chosen by voters of an entire state; members of legislative bodies and judges of courts of record, § 6(f) and 32 C.F.R. § 1622.41; aviation cadet applicants, § 6(e).

FN14. Included in this category are occupationally deferred registrants, 32 C.F.R. § 1622.20 *et. seq.* and § 6(h) of the Act; and those deferred on grounds of family need (dependency), 32 C.F.R. § 1622.30 and § 6(h).

FN15. These include the availability classification of I-A, 32 C.F.R. § 1622.10, the noncombatant duty

classification (I-A-O) for conscientious objectors, 32 C.F.R. § 1622.11, and the civilian work classification (I-O) for conscientious objectors. By properly denominating this entire group as "service determinators" much of the Solicitor General's fears of considering conscientious objectors as "statutorily deferred" and thus allowed "early" judicial review are removed. (See Brief for Respondents, *Oestereich v. Selective Service Local Board No. 11,* 393 U.S. 233 (1968) at 65.) It should be pointed out that during the period in which the registrant holds a I-O classification he is obligated to serve his country in civilian work contributing to the national interest, and thus it may be argued that he should normally be required under all circumstances to exhaust his remedies by submitting to the order to report for civilian work before attempting to gain judicial review. See *Clark v. Gabriel,* 393 U.S. 256 (1968). A different case would be presented, however, if, having held a I-O classification, a registrant was then punitively reclassified. Then, even though the classification required board discretion and was subject to basis in fact review, the fact that it had formerly been given and was withdrawn for conduct not material to the original extension of the classification might allow for early review. *Cf. Clark v. Gabriel,* 393 U.S. at 259-260 (Douglas, J., concurring).

In addition to these classifications, several others are variously and interchangeably described in the statute as deferments or exemptions[FN16] evidencing the fact that this statute, "a masterpiece of poor draftsmanship in every way"[FN17] which was "built hastily in an atmosphere of crisis in 1940,"[FN18] has never been thoroughly ***20** amended to remove the structural deficiencies or ambiguities which abound.[FN19]

FN16. See §§ 6(c) & (d) of the Act. The regulations remain neutral in light of this language and do not identify these classifications as deferments or exemptions. See 32 C.F.R. § 1622.13.

FN17. Griffiths, *Some Notes on the Solicitor General's Memorandum in Oestereich,* 1 Sel. Serv. L. Rep. 4012, 4014 (1968).

FN18. Comment, 54 Calif. L. Rev. 2123, 2124 (1966); *cf. Falbo v. United States,* 320 U.S. 549 (1944).

FN19. See, *e.g.,* White, *Processing Conscientious Objectors' Claims: A Constitutional Inquiry,* 56 Calif. L. Rev. 549 (1968), Griffiths, Book Review, 77 Yale L. J. 827 (1968).

Thus, "exemption" and "deferment" are not terms of art expressing that in the one case national policy would provide for a mandatory exclusion or exception from service, and in the other Congressional intent was to allow the President or local boards discretion to determine whether exceptions should be granted in certain authorized categories, and within those categories to whom. it is this presence or lack of discretion which *Oestereich's* rationale makes controlling. And see Harlan, J., concurring, 393 U.S. at 239. Thus, the Vice President of the United States is deferred *mandatorily* by the terms of § 6(f) of the act:
"The Vice President of the United States ... shall, while holding [office], be deferred from training and service ..."

Can it be said that the "exemption" for ministry students is any more clear?

Sec. 6(f) also grants a deferment to "judges of the courts of record of the United States." See *Estep v. United States,* 327 U.S. 114, 121 (1946). If the President should nominate and the Senate confirm a Justice of this Court who was

32 years of age[FN20] and who, by virtue of having had a deferment, was liable for military service, and the local board took away his IV-B deferment under the delinquency power because it disagreed with his judicial opinions, would the Justice have to refuse to submit to induction and defend a criminal ***21** prosecution or, in the alternative, submit to induction, don the uniform of the Army and litigate through petition for habeas corpus? Such a remorselessly narrow reading of *Oestereich* could not be required by any rational considerations of deference to Congress or the Executive Branch; indeed, such a reading would, equally with a denial of relief in *Oestereich,* frustrate the Congressional intention expressed in § 6(f)'s mandatory terms. See *Schwartz v. Strauss,* 206 F. 2d 767, (2d Cir. 1953) (Frank, J., concurring).

FN20. Joseph Story was 32 when appointed.

Thus, whatever distinction is to be drawn between the classification decisions which are properly the subject of early judicial review and those which are not, that between deferments and exemptions would not be rational. See *Nat'l Students Ass'n v. Hershey,* ____ F. 2d ____ (D.C. Cir. 1969) (slip op., p. 33).

3. Early Judicial Review Should Be Available to Test Any Alleged Board Violation of a Clear Legal Duty Owed the Registrant.

In *Clark v. Gabriel,* 393 U.S. 256 (1968), the Court, in refusing preinduction review to test the board's denial of a conscientious objector exemption following the normal classification procedure, distinguished *Oestereich* as follows:
"In Oestereich the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by statute and not dependent upon an act of judgment by the board." 393 U.S. at 258.

Here, petitioner urges, is the central meaning of *Oestereich,* from which a general rule of early judicial review***22** may be fashioned. One begins with the premise that § 10(b)(3) is not to be literally and unquestioningly applied to force every registrant, however clearly and scandalously aggrieved by the Selective Service System, to risk loss of liberty in order to gain judicial review.

Restricting statutory bars on judicial review of administrative action to the usual and general run of cases in which the administrator is exercising judgment and using discretion is nothing new. In *Leedom v. Kyne,* 358 U.S. 184 (1958), the Court had before it the judicial review preclusion provisions of § 10(c) of the Taft-Hartley Act. The NLRB had, on the undisputed facts, placed in the same bargaining unit both professional and nonprofessional employees, in flat contradiction of § 9(b)(1) of the Act. The professionals, through their employees' association, sued to set aside the board's order, and were met with the contention that § 10(c) of the Act bars judicial review except in a proceeding brought to enforce an order of the board restraining an unfair labor practice. The Court held for the professionals on the ground that the statutory right not to be placed in the same bargaining unit would be undermined by an unduly literal reading of the judicial review limitation. The action of the Board, the Court held,
"deprived the professional employees of a 'right' assured to them by Congress. Surely in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given." 358 U.S. at 189.

Leedom--as did *Oestereich*--applies to questions of "ripeness," or the timing of judicial review, a doctrine ***23** often used in cases involving "exhaustion of administrative remedies." Just last Term, in *McKart v. United States,* _____ U.S _____ (1969), the Court held that a registrant clearly entitled to a "sole surviving son" classification would not be denied judicial review for failure to take administrative appeals available to him within the Selective Service System.

Whatever the provenance of the "no deference" doctrines of *Leedom, Oestereich* and *McKart,* their essential utility is easily demonstrated. Rules concerning judicial review of administrative action are designed to enable the administrator to do his job, to defer to his expertise (or at least to his statutorily-delegated discretion), and to keep cases out of court as long as possible in the hope that they will be settled within the administrative agency itself. In the case of the Selective Service System, Congress limited judicial review so that the vital business of raising an army would not be hindered by litigation. But that congressional judgment begins and does not end inquiry. World War II may have required total mobilization at the cost of delaying judicial review. Today, only a small minority of registrants are classified as available for service, and few of these are in any immediate danger of induction. The Selective Service System always more than fills its quota. An induction order, once issued, remain outstanding so that a registrant who commences a civil suit will not by becoming older escape liability for service. (This often happens in cases in which a registrant refuses to submit to induction and then is acquitted after reaching 26. *Cf.* Sel. Serv. L. Rep., Practice Manual ¶ 8.1).[FN20a] Surely, by applying familiar principles to ***24** isolate those cases and questions which courts possess special competence to resolve and which require no extensive factual inquiry, a workable rule of early judicial review can be made which accommodates the governmental interest in raising armies.

FN20a. See *Nat'l Students Ass'n v. Hershey* _____ F. 2d _____, _____ n. 17 (D.C. Cir. 1969).

The Military Selective Service Act of 1967, like its predecessors since 1917, gives principal responsibility for fact-gathering and decision-making to local selective service boards composed of civilians and acting in most cases with a great deal of discretion. See Sel. Serv. L. Rep., Practice Manual ¶ 2; Nat'l Advisory Comm'n on Selective Service, in Pursuit of Equity; Who Serves When Not All Serve? (1967); Davis & Dolbeare, Little Groups of Neighbors (1968). Decisions concerning such matters as whether a registrant's induction will cause hardship to his dependents, whether his occupation is filling a vital community need, or whether he is a sincere religious objector to war, are subjected to a narrow judicial review only at the end of the selection process. The board's decision will at that time be upheld unless it has no basis in fact. This rule, however cogent the criticism to which it is subject, goes to great--indeed, unprecedented--length to defer to the discretion of the local board. But this Court has recognized that when weighing of facts is not involved, this claim of the System to deference is given scant attention. This Court has held that when any agency of the Selective Service System has misinterpreted the law relating to deferment or exemption, *e.g., Sicurella v. United States,* 348 U.S. 385 (1955); *McKart v. United States,* ____ U.S. ____ (1969), or where a procedural error has hindered the registrant in pursuing his claim for deferment or exemption, *e.g.,* ***25***Simmons v. United States,* 348 U.S. 397 (1955); *Boswell v. United States,* 390 F. 2d 181 (9th Cir. 1968), the System's classification decision is to be surely and swiftly overturned without consideration of the deference due the board's expertise or discretion. Some rights, it seems,, are principally in the keeping of courts, and the interpretation of statutes is the judiciary's special province. See *McKart v. United States, supra; Wills v. United States,* 384 F. 2d 943 (9th Cir. 1967), cert. denied, 392 U.S. 908 (1968).

Another element remains to be considered: the bar to early judicial review is generally designed to keep cases out of court in the hope they will be settled within the agency. This issue is irrelevant to a case in which the registrant's last and only remedy is the relatively insignificant final trip to the induction center, see *McKart v. United States, supra,* and the dispute is whether he shall surrender himself into military custody or make himself subject to indictment as a prerequisite to gaining an authoritative judicial determination of his liability for service. The only way in which forcing him to take one or the other of these choices serves an interest in keeping cases out of court is by making judicial review so costly the registrant is likely to acquiesce in the System's error. Judicial convenience should not be purchased at such a price. *Cf. Bantam Books v. Sullivan,* 372 U.S. 58 (1963). See note 6 *supra.*

The above analysis suggests that judicial review should be available when there is little prospect of hindering the System of raising an army, and when the issue does not involve considerations of local board discretion or expertise. *Cf.* concurring opinion of Harlan, *J.,* ***26***Oestereich v. Selective Service Board,* 393 U.S. at 239. Such a rule would not do violence to Congressional intent or to the language of § 10(b) (3).

Sec. 10(b)(3) refers literally to the "basis in fact" test of the validity of local board action, incorporating the language of *Estep v. United States,* 327 U.S. 114, 122 (1946). Yet, as the cases cited above demonstrate, this Court and the lower courts grant review of Selective Service decisions upon at least two grounds in addition to "no basis in fact," these being "error of law" and "procedural error." See also Sel. Serv. L. Rep., Practice Manual ¶¶ 2408-10. The "basis in fact" test refers only to review of board decisions which involve the weighing of evidence. See *Clark v. Gabriel,* 393 U.S. 256 (1968). Yet no one would contend that enactment of § 10(b)(3) is intended to restrict the scope of judicial review, or to do away by legislation with the consistent course of decision in this Court and the lower federal courts. See *United States v. Lybrand,* 279 F. Supp. 74 (E.D.N.Y. 1967). The thrust of § 10(b)(3) thus appears to be directed at ensuring respect for board determinations of *fact.* In this case, however, there is involved only a determination of legal rights and duties unaccompanied by complex or contested issues of fact.

Petitioner suggests that this distinction between board functions to which discretion is due and those to which it is not provides a rational basis for determining when early judicial review shall be available and when not. If this is the test in *Oestereich,* as the *Gabriel* opinion strongly suggests, 393 U.S. at 258, then as a general rule the availability of early judicial review will be co-extensive with the availability of relief in the nature of mandamus under 28 U.S.C. § 1361, with all ***27** the jurisdictional and venue advantages which that section confers.[FN21]

> FN21. The Court may decide that, in line with the literal language of *Gabriel,* cited in the text, early judicial review will be available only when rights of *statutory* provenance have been violated. Such a limitation seems indefensible. An agency is bound by the due process clause to obey its own *regulations, Vitarelli v. Seaton,* 359 U.S. 535 (1959), and clear constitutional violations appear just as important to guard against as violations of statute. See *Wolff v. Selective Service Local Board No. 15, 372* F. 2d 817 (2d Cir. 1967); *Dombrowski v. Pfister,* 380 U.S. 459 (1965).

The suggestion that judicial review should be available prior to induction when the board is manifestly in default of a clear legal obligation, or when its conduct is "manifestly outrageous," finds support in the purpose and central meaning of § 10(b)(3). For § 10 (b) (3) was a prophylactic statute, designed to prevent judicial lawmaking by legislating the rule in *Estep v. United States,* 327 U.S. 114 (1946). But cases properly following *Estep* in the years be-

tween 1946 and 1967 had allowed early judicial review when board action was manifestly outrageous. These cases were *Tomlinson v. Hershey,* 95 F. Supp. 72 (E.D. Pa. 1949); *Ex parte Fabiani,* 105 F. Supp. 139 (E.D. Pa. 1952); *Townsend v. Zimmerman, 237* F. 2d 376 (6th Cir. 1956); *Wolff v. Selective Service Local Board No. 15,* 372 F. 2d 817 (2d Cir. 1967).

In *Tomlinson,* the district court refused to dismiss the complaint for declaratory judgment and injunction, without extensive discussion of a rationale for granting early review. Tomlinson apparently did not pursue his suit, however.

In *Fabiani,* the registrant was an American medical student of Italian descent studying in Italy because no ***28** American, British or Canadian medical schools had accepted him. His local board chairman, a veterinarian, did not think Fabiani's medical school, the University of Rome, would be qualified to grant an accredited degree and had previously attempted to discourage him from attending there. After Fabiani had been in Rome several months, his local board reclassified him and ordered him to report for induction. When he would not return, the local United States Attorney threatened prosecution. Fabiani then returned to the United States and petitioned for habeas corpus, claiming that the issuance of an order to report for induction placed him in constructive custody. The court held that the outrageous, clearly illegal board action in depriving him of deferment warranted preinduction review. The court's holding that Fabinai was "in custody," was cited with approval in *Jones v. Cunningham,* 371 U.S. 236, 240 n. 11 (1963).

Townsend, cited with approval in *Oestereich,* 393 U.S. at 238, involved a local board refusal to reopen the registrant's classification. Judge (now Justice) Potter Stewart's opinion appears to rest upon the board chairman's bad faith in not reporting information given him by the registrant to the local board, the board's refusal to give the registrant a classification provided in the regulations to which he was clearly entitled, and (as appears in Justice Douglas's opinion in *Oestereich*) a board member's amorous interest in the registrant's wife. 393 U.S. at 237. At the least, the court held, the board's action should have been taken in a manner which would give the registrant his right of appeal from the local board's decision under 32 C.F.R. § 1625.13 (1969).

***29** *Wolff* involved punitive reclassification of registrants who had participated in a sit-in at a local draft board. The court's holding rested upon the constitutional implications of punitive reclassification designed to punish arguably protected speech, and on the local board's lack of authority to use the delinquency power to reach conduct which § 12(a) of the Act made clear was to be punished in the criminal courts and there only. These four cases, it is submitted, properly interpret the rule in *Estep. v. United States,* 327 U.S. 114 (1946). *Estep* construed the statutory provision, now contained in § 10(b) (3) of the Act, 50 U.S.C. App. § 460(b) (3), making decisions of selective service boards "final." The Court held that "final" did not mean "subject to no judicial review" but rather betokened a Congressional intention severely to restrict the *scope* of judicial review. Only when the local board's decision lacked a "basis in fact" was it to be overturned. As pointed out above, the "basis in fact" test is not the only test of validity of board decisions. In any case, the Court's holding in *Estep* did not speak to the timing of judicial review, except to distinguish the earlier case of *Falbo v. United States,* 320 U.S. 549 (1944), in which judicial review had been denied, as one involving a failure to go to the brink of induction and exhaust all possible means of mooting the controversy by an administrative declaration of unsuitability for service. *Falbo,* as thus interpreted, deals not with the timing of review, but with the necessity of exhausting administrative remedies. See *McKart v. United States,* _____ U.S. _____ (1969). Griffiths, *Some Notes on the SG's Memorandumn in Oestereich,* 1 Sel. Serv. L. Rep. 4012, 4014

n. 13 (1968).

***30** Some lower courts, however, took *Estep* as signalling that no review was ever to be granted except in a criminal prosecution for refusal to submit to induction or in a habeas corpus proceeding[FN22] These cases were *Lynch v. Hershey,* 208 F. 2d 523 (D.C. Cir. 1953); *Schwartz v. Strauss,* 206 F. 2d *767* (2d Cir. 1953), *aff'g* 114 F. Supp. 439 (S.D.N.Y. 1953); *Hirsh v. Adair,* 113 F. Supp. 116 (E.D. Pa. 1953); *Permutt v. Armstrong,* 112 F. Supp. 247 (N.D. Ill. 1953); *Westerbeke v. Local Draft Board No. 2,* 118 F. Supp. 441 (E.D.N.Y. 1954); *Runzsa v. United States,* 212 F. 2d 927, 937 (7th Cir. 1954); *Watkins v. Rupert,* 224 F. 2d 47 (2nd Cir. 1955); *Reap v. James,* 232 F. 2d 507 (4th Cir. 1956); *Tamtarkin v. Selective Service Bd. No. 47,* 243 F. 2d 108, 109 (5th Cir. 1957); *Sorenson v. Selective Service Bd. No. 107,* 203 F. Supp. 786 (E.D. Pa. 1962); *Feldman, v. Local Bd. No. 22,* 239 F. Supp. 102 (S.D.N.Y. 1964); *Muhammad Ali v. Connally,* 266 F. Supp. 345 (S.D. Tex. 1967).

> FN22. In so holding, some courts drew support from dicta in *Witmer v. United States,* 348 U.S. 375, 377 (1956), and *Dickinson v. United States,* 346 U.S. 389, 394 (1953). But *Dickinson* and *Witmer* were "basis in fact" cases, and in *Dickinson* the rule in *Estep* was recognized to govern the *scope* of review.

Of these cases, *Reap* and *Tamarkin* rely in part upon the *Witmer* and *Dickinson* dicta discussed in note 22 *supra, Permutt, Westerbeke* and *Rumsa* rested upon an alleged failure to "exhaust administrative remedies," and *Schwartz,*[FN23] *Watkins, Feldman* and *Mulhammad Ali* rely upon both notions. *Lynch* contains no basis for the court's holding. *Hirsh* relies upon the equitable doctrine ***31** of "unclean hands," and thus supports early review since the court did not reach the government's contention concerning the unavailability of early review. *Sorenson* acknowledged the early review cases but held that the special circumstances which underlay them were not present, then appeared to rest decision upon justiciability and improper service of the complaint.

> FN23. Judge Frank's concurrence expressed the view that the question of jurisdiction was coterminous with that on the merits, and found that the plaintiff should not prevail on the merits. 206 F. 2d at 767.

The cases denying review therefore either support the view that such review is *available* in a proper case,[FN24] or are based upon a misinterpretation of the *Falbo-Estep* rule.[FN25]

> FN24. The Second *Circuit's* decision in *Wolff* casts doubt upon the viability, as of 1967, of some authority among the "no early review" line of decisions, for it appears to adopt the theory of Judge Frank's concurrng opinion in *Schwartz.*

> FN25. It is not novel that this should happen. As Justice Frankfurter pointed out in dissent in *Estep,* the lower courts' interpretation of *Falbo* did not bear examination when in *Estep* the Court came to consider the availability of judicial review. 114 U.S. at 139.

Moreover, cases since *Oestereich* have recognized the "manifestly outrageous" or "clear legal error" rationales for early judicial review, in granting relief to students whose statutory I-S deferments were denied to them under the Selective Service System's mistaken interpretation of the law. See, *e.g., Foley v. Hershey,* 409 F. 2d *827* (7th Cir. 1969); *Bowen v. Hershey,* 37 U.S.L.W. 2581 (lst Cir. Mar. 26, 1969); *Carey v. Local Bd. No. 2, 297* F. Supp. 252

(D. Conn. 1969), *aff'd,* ____ F. 2d ____ (2d Cir. 1969).

These decisions, it is submitted, well reflect the teaching of *Oestereich* and *Gabriel.* A rule of judicial review which leaves § 10(b)(3) unimpaired in the review of local board's discretionary decisions, weighing the evidence in the registrant's file and making judgments***32** about dependency or community need, but permits early review when the question is one of law unbeclouded with factual controversy serves both the need to raise an army and the Congressional command that the system of selection "fair and just." Military Selective Service Act of 1967, § 1(c), 50 U.S.C. App. § 451 (c).

B. Section 10(b)(3) Is Unconstitutional. If Not, the Constitutional Issues It Tenders Require That It Be Read Narrowly.

The issue of § 10(b)(3)'s constitutionality was here last term in *Clark v. Gabriel,* 393 U.S. 256 (1968), but did not receive plenary consideration. Petitioner raises this question not only because it warrants the Court's renewed examination, but because the considerations here advanced support as well the narrow reading of § 10(b)(3) urged in I, A, *supra.* This case does not present the first occasion on which the Selective Service law must be interpreted "in the candid service of avoiding a serious constitutional doubt," Douglas, J., concurring in *United States v. Seeger,* 380 U.S. 163, 188 (1965).

In the current Act, Congress has established a system which relies upon the judiciary for enforcement, yet permits court to make only limited inquiry into the legality of board orders.

Estep v. United States, 327 U.S. 114, 119 (1946). Penal coercion is the method by which Congress has attempted to ensure compliance with board orders. The implications of this use of the courts are important.[FN26] ***33** Though Congress may have the power, within limits yet undetermined, to withdraw from the judiciary the power to hear some issues altogether,[FN27] the validity of restricting judicial prerogatives is less certain when, as with Congressional action in the Military Selective Service Act of 1967, the federal judiciary is granted *some* role. By using the courts merely as an enforcing and validating mechanism Congress arguably has overstepped the limits upon its power to dictate to a coordinate branch of government. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), and *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1872), stand for the proposition that an Article III court granted the power to adjudicate some of the issues at stake in a particular case has the power to reach and decide every legal and constitutional claim raised as a potential bar to the exercise of its authority:

> FN26. "[S]o long at least as Congress feels impelled to invoke the assistance of the courts, the supremacy of law in their decisions is assured," Hart & Wechsler, The Federal Court and the Federal System 325 (1953).
>
> FN27. See Wright, Federal Courts § 10 (1963); *cf. Ableman v. Booth,* 62 U.S. 506 (1859); *Pennsylvania Turnpike Commn'n v. McGinnis,* 179 F. Supp. 578 (E.D. Pa. 1959).

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule..." *Marbury v. Madison,* 5 U.S. at 177.

Moreover, the rule in *Klein* is that once the courts are granted jurisdiction to decide claims, their role cannot be reduced to that of a rubber stamp by making factual determinations of a nonjudicial body conclusive. In *Klein,* the Court was granted jurisdiction to review awards of the Court of Claims, but was told that once certain facts appears, it was bound to indulge a nonrebuttable presumption which required reversal of the ***34** judgment allowing the respondent's claims. This, said the Court, amounted to a trespass by Congress upon the province of the judiciary.

Sec. 10(b) (3) violates the basic separation of powers doctrine of *Marbury* and *Klein,* for it makes local board factual determinations conclusive and makes the price of even the narrow judicial review granted so high that most victims of local board error-or even caprice--will likely choose to forego seeking vindication of their rights. These two barriers to judicial review-the scope of review and the timing of review, deserve independent analysis.

1. The Basis in Fact Test.

The role of the courts in reviewing local board decisions of fact is limited to searching the registrant's selective service file to find some evidence inconsistent with his claim. See *Cox v. United States,* 332 U.S. 442 (1947); *Witmer v. United States,* 348 U.S. 375 (1956); *Dickinson v. United States,* 346 U.S. 389 (1953); *United States v. Washington,* 392 F. 2d 37 (6th Cir. 1968) (summarizing the law). Yet this attitude of the courts, conditioned by the language of § 10(b)(3) really comes to this: If there is any scrap of evidence upon which the board might have relied, the court will uphold its action.[FN28]

> FN28. The "error of law" and "procedural error" bases of review discussed above mitigate the harshness of this rule somewhat. But they are of minimal relevance in the vast majority of cases, for boards are not required to give reasons for their decisions and can thus insulate the legal bases of their decisions from review and accept the minimal risk that the court will not find some item in the file on which the board *might* have relied.

In effect, the basis in fact test asks courts to validate losses of liberty by registrants, or in the case of refusal ***35** of induction prosecutions, to enter judgment of conviction for a felony,[FN29] while depriving them of the, right to inquire whether there exist the facts which by statute and regulation are prerequisite to this loss.

> FN29. In criminal cases, the question is more serious yet. See *Leary v. United States,* ____ U.S.____ (1969); *United States v. Gainey,* 380 U.S. *63, 74* (1965) (Black, J., dissenting).

Petitioner recognizes that judicial review of agency action is seldom granted in generous measure and that deference is the rule rather than the exception. But the agency decisions to which such deference is given are made on the record, after a hearing, by agency personnel kept insulated from the prosecutive function, and the parties are entitled to be represented by counsel. The Selective Service System, by contrast, is exempt from the adjudicative requirements of the Administrative Procedure Act. Military Selective Service Act of 1967 § 13(b), 50 U.S.C. App. § 463(b). Nor does the selective service registrant deal with a decisionmaker who in any sense can be termed an "expert." There is no orderly, efficient consistent means, by which local board members are kept abreast of regulatory and decisional law changes which affect their work. Local board arbitrariness or hostility is also a factor, and there is ample proof

that it is a significant factor in the Systems' operation. See generally Davis & Dolbears, Little Groups of Neighbors (1968); Nat'l Advisory Comm'n on Selective Service, in Pursuit of Equity: Who serves When Not All Serve? *(1967)*. *Cf.* Wright, Book Review, 78 Yale L. J. 338 (1968).

Thus, the "basis in fact" test operates to deny registrants any federal forum which will give a meaningful hearing on their claims to enjoy that which Congress***36** by statute and the President by regulation has said they are entitled to have. *Cf.* *Oestereich v. Selective Service Bd.,* 393 U.S. 233, 243 (1968) (Harlan, J., concurring). By legislating the basis in fact test, Congress has set up a system of governmental benefits, but conditioned their enjoyment upon the intended recipient surviving a process in which the probative force of his evidence that he is entitled to the benefit is not the governing factor. See Van Alstyne, *The* *Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1969). The basis in fact test gives the Selective Service System too large a margin of error to be tolerated in a scheme of regulation in which personal liberty is at stake. Within this margin of error, boards are left free to be arbitrary and to make irrational distinctions between registrants who make the same factual showing.

Perhaps the Congress need not provide any review at all of Selective Service decisions-that is a matter we need not consider, though it is fraught with constitutional questions. See *Estep v. United States,* 327 U.S. 114, 120 (1946). But having provided a system of review, the system may not indulge or permit arbitrary distinctions between the claims it will hear and those which it will not. See *Griffin v. Illinois,* 351 U.S. 12 (1956). Nor can Congress bind the court to be heedless of the facts which make up the aggrieved party's claim. *United States v. Klein, supra.* Indeed, a court denies due process when, its aid having been invoked, it declines to give appropriate weight to facts upon which loss of liberty may depend. *Cf.* *Thompson v. Louisville,* 362 U.S. 199 (1960). And this is because once it is "in the act," *the court* is the decisionmaker***37** and cannot escape responsibility for its decision by claiming that one of the parties was the real mover. *Shelley v. Kraemer,* 334 U.S. 1 (1948).

The central role of courts in safeguarding personal liberty has led this Court to lay down detailed rules concerning determinations on appeal involving the possibility that a criminal defendant has been prejudiced by introduction of evidence which, as a matter of extrinsic policy, should have been excluded. *E.g.,* *Chapman v. California,* 386 U.S. 18 (1966). No loss attention should be given to safeguarding the reliability of the fact-determining process when questions of the reliability and probative force of evidence are at stake.

2. The Timing of Review.

This Court has considered arguments addressed to the chilling effect on the registrant's right to judicial review--and therefore on his substantive right to be properly classified--of a provision which requires that he risk loss of liberty in order to obtain review. *Ex parte Young, 209* U.S. 123 (1908); Leonard, & Frantz, *Judicial Review of Selective Service Orders, 26* Nat. Law. Guild Practitioner 85 (1967); *Peterson v. Clark,* 289 F. Supp. 949 (N.D. Calif. 1968).

But the papers in *Clark v. Gabriel,* 393 U.S. 256 (1968), did not discuss the impact of deferred judicial review upon local selective service boards and the System generally. The crucial question in governing a System which the Congress has commanded shall be "fair and just" is how to check board discretion to ensure that like cases are decided alike and that in areas (such as concientious objection) where complex factual questions visit discretion in fact but important rights of religious ***38** freedom are at stake, see *United States v. Seeger,* 380 U.S. 163 (1965), the board

applies proper criteria. Prompt judicial review, which defines the rights of parties with certainty, is essential to police the operations of the System. *Cf. Dombrouwski v. Pfister,* 380 U.S. 459 (1965). In the context of selective service procedure, judicial review at the time of board misconduct is the only means to bring the law into the life of the System.

II.

THE SELECTIVE SERVICE DELINQUENCY REGULATIONS, 32 C.F.R. PART 1642, ARE INVALID ON THEIR FACE AND AS APPLIED TO DENY PETITIONER HIS STATUTORY II-S CLASSIFICATION.

Petitioner adopts and incorporates by reference the arguments advanced in Brief for Petitioner, *Gutknecht v. United States,* No. 71, O.T. 1969, Point I. The arguments below will discuss only questions concerning the delinquency regulations which are peculiar to this case.

1. The Application of Oestereich.

The decision of this Court in *Oestereich v. Selective Service Board,* 393 U.S. 233 (1968), seemed at times to make the question of preinduction judicial review coterminous with the merits of denying petitioner his classification. There is nothing inherently illogical or unprecedented about such an analysis, see *Leedom v. Kyne,* 358 U.S. 144 (1958), despite the criticism in *Oestereich,* 393 U.S. at 249. But there is an isolable issue on the merits in this case, as there was in *Oestereich* and in *Leedom.* The Congress has granted a II-S undergraduate***39** deferment to every registrant who meets certain simple criteria. Is the grant so unequivocal as to fall below the dignity of that in *Oestereich* and *Leedom?* Is there elsewhere in the statute an authorization for a local board to take away that which is given by Congress upon grounds unrelated to the Congressionallyestablished criteria? Petitioner answers no to both these questions.

The court of appeals rested its decision upon the language in § 6(h)(1) of the Act, "the President shall, under such rules and regulations as he may prescribe." Given the mandatory "shall," the express limitation upon the President's power to restrict student deferments later on in § 6(h)(1), and the Congressional state of mind concerning the student deferment, H.R. Rep. No. 267, 90th Cong., 1st Sess, at 22-27 (1967), it is difficult to regard this language as other than an authorization to make procedural rules for carrying out the legislative will.

The second question above is answered at length in the *Gutknecht* brief. Focussing narrowly upon the II-S deferment, however, the "statutory delinquency concept", 393 U.S. at 239 if such there be--refers no more to student deferments than it does to those preparing for the ministry. Here as in *Oestereich* the Congress has spelled out with some precision the standards to be employed in granting the immunity from service: the President *shall* provide, the statute says, for deferment of everyone within a specified class of registrants. Exceptions to that explicit statutory command should, on general principles of construction, be explicit as well, and authority to take away the statutory grant should not be inferred from language elsewhere in the statute ***40** which is no vague as to have no meaning and so spare as to have no significance. See *Fourco Glass Co. v. Transmirra Prod. Corp.,* 353 U.S. 222, 228-29 (1957).

Therefore, whether or not the delinquency power is found to be constitutional and warranted by the statute as a general matter, it is not broad enough to justify stripping petitioner of his deferment.

2. The System's Failure to Provide Petitioner Notice Before Terminating His Deferment Makes Its Action Invalid.

Timely and adequate notice is one of the cardinal principles of procedural fairness, and it is probably the procedural requirement which the courts have been compelled most often to enforce--whether by demanding adherence to a regulation requiring notice, or by invoking due process directly--in selective service cases. In the case of alleged "delinquents" the regulations are explicit on the subject of notice. Reg. 1642.4(a) provides that a Local Board "may declare [a registrant] to be a delinquent" if he failed to perform a duty required of him. Reg. 1642.4(b) provides that "When the local Board declares a registrant to be a delinquent, it ... shall complete a Delinquency Notice (SSS Form 304) ... setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant...."

Finally, Reg. 1642.10 provides that
"So delinquent registrant shall be placed in Class I-A, Class I-A-O ... unless the local board has declared him to be a delinquent in accordance with the provisions of Section 1642.4 and thereafter has not removed him from such delinquency status."

***41** The orderly procedure contemplated by these regulations (and the rest of Part 1642) could hardly be clearer: (1) information comes to the attention of the Local Board indicating that a registrant is delinquent; (2). the Local Board declares that this is the effect of the information, and notifies the registrant; (3) the registrant is afforded a reasonable time to clear up the matter (see Reg. 1642.4(c)); (4) only if, after a reasonable time, the board "has not removed him from such delinquency status" may it proceed to reclassify him based upon his delinquency status (Reg. 1642.12). SSS Form 304 is itself perfectly explicit as to its purpose. It tells the registrant why he has been placed in delinquency status, it directs him to communicate at once with his Local Board or to seek advice from the Local Board nearest him, and it notifies him that his alleged breach of duty is a crime and that, if not cleared up, may result in a I-A classification.

It is clear that on no view can the actions of Local Board No. 16 be held to have complied with the simple, straightforward notice requirement of the Regulations. *Appellant received a delinquency notice and a notice of reclassification on the same day. Both notices were mailed the same day (January 9, 1968).* The notice of delinquency required by the Regulations was deprived of any function whatsoever. How could petitioner clear up the matter which his local board, as SSS Form 304 required him to do lest he be reclassified I-A? How could he remove the delinquency after reasonable notice, as Regs. 1642.4(c) and 1642.10 contemplate ?

The purpose of the procedure set out in the Regulations is apparent. Many seeming delinquencies may--***42** when brought to the attention of the registrant-be quickly cured, or may turn out not to exist. In such circumstances, the Regulations would be unreasonable--and perhaps even void--if a declaration of delinquency could be coupled with a simultaneous reclassification to I-A, with the consequent immediate exposure to an induction order which the Act (§ 12(h)(1)) and the Regulations (Reg. 1642.13) provide. If the consequences of a delinquency declaration were to be so immediate and so drastic, clearly some notice to the registrant before he was declared a delinquent would have to

be (and would have been) afforded by the regulations. But the point is that the delinquency notice is exactly what the regulations call it--a "Notice"--and to function as such it must precede, by a reasonable period of time, the action of the local board.

Finally to be disposed of is any idea that the departure from proper procedure was a trivial one which could not have caused prejudice. This is not a case of giving adequate notice but departing slightly from the proper form--and in which there is actual notice anyway--as in *Atkins v. United States,* 204 F. 2d 269 (10th Cir.), cert. denied, 346 U.S. 818 (1953). Nor is this a case in which an order from a Local Board is proper in all respects except that it is signed by the clerk, whose authority to do so was not properly entered in the board's minutes, as was the case in *Smith v. United States,* 157 F. 2d 176, cert. denied, 329 U.S. 776 (1946). In such cases courts may treat the procedural***43** default as *de minimis.* But in this case the critical procedural right to proper, timely and adequate notice was denied. As this Court has said of a similar procedural error,

"This is not an incidental infringement of technical rights. Petitioner has been deprived of ... a fundamental safeguard, and he need not specify the precise manner in which he would have used this right--and how such use would have aided his cause--in order to complain of the deprivation." *Simmons v. United States,* 348 U.S. 397, 406 (1955)."

See also: *Wills v. United States,* 384 F. 2d 943 (9th Cir. 1967), *cert. denied,* 392 U.S. 908 (1968).

The crucial function of notice and a "pretermination hearing" is not a question peculiar to the law of selective service. In the field of welfare law as well, courts have been careful to hedge the termination of benefits upon which the recipient has relied in making his plans with the right to be heard. See, *e.g., Kelly v. Wyman,* 294 F. Supp. 893 (S.D.N.Y. 1968), *prob. juris* noted *sub nom. Goldberg v. Kelly,* 37 U.S.LW. 3399 (Apr. 21, 1969). No less attention should be given these rights when under consideration is whether the System may precipitously interrupt a registrant's studies at midyear (overriding apparently even his absolute statutory right to an I-S deferment under § 6(i) (2) of the Act.)

***44** Conclusion.

For the foregoing reasons, it is respectfully prayed that the judgment of the court of appeals be reversed and the cause remanded to the district court with directions to hold a hearing to determine whether petitioner meets the qualifications for a statutory II-S deferment, and if so to enter judgment in his favor.

Appendix not available.

Breen v. Selective Service Local Bd. No. 16
1969 WL 120167 (U.S.) (Appellate Brief)

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